Damayanti Kantilal Doshi & Anor v Jigarlal Kantilal Doshi

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO J–02–682 OF 2001

ABDUL HAMID MOHAMAD, RICHARD MALANJUM JJCA AND KANG HWEE GEE J

12 DECEMBER 2003

Civil Procedure — Injunction — Balance of convenience — Recourse to recover fund — Duplicity of proceedings — Whether issue of estoppel exist — Live issues awaiting judicial determination — Non-disclosure at ex parte hearing — Whether trial judge had proceeded on wrong grounds in exercise of discretion to grant injunctions — Whether appellate court entitled to interfere

All the parties were beneficiaries to the estate of the late Kantilal Prabhulal Doshi ('Doshi') on equal share. The first and second appellants made an application for the continuation of an ex parte injunction order restraining the respondent who was the managing director as well as majority shareholder of Overseas Industries Sdn Bhd ('OISB'), where the Fund was placed, under the account name of Towry Law Asset Management Sdn Bhd ('Towry Law'), from dealing in any manner with the assets and funds held by Towry Law. At the ex parte stage, the learned judicial commissioner ('the JC') allowed the application of the appellant to restrain the respondent in his demand for the release of the fund from Towry Law. However, upon hearing the matter on inter parte, the earlier ex parte order was set aside and the application for injunction was refused on the following grounds: (i) that there was already the 3863 Consent Order subsisting that protected the fund; (ii) that there was a material non-disclosure at the ex parte application stage, hence in breach of O 29 r 1(2)(B) of the Rules of the High Court 1980 ('the RHC'); (iii) that there was a failure on the part of the appellants to comply with O 3 r 6 of the RHC before making the ex parte application; (iv) that the several court proceedings instituted by the appellants 'smacks of one of the worst cases of abuse of process and thus interlocutory relief should be refused'; (v) issue of estoppel as res judicata; (vi) that there was an earlier court order which debarred the appellant as directors of OISB; (vii) that the issue of whether there was serious question to be tried no longer pertinent in view of the 195 Consent Order; (viii) that on the balance of convenience it was in favour of the respondent since the fund was the core assets of OISB and it would be detrimental to its operation if it was withheld; and (ix) that on the adequacy of damages there was no challenge in respect of the respondent's ability to meet any claim for damages.

Held, setting aside the order and allowing the application by the appellants:

(1) The decision of the learned JC in refusing to grant an interlocutory injunction was an exercise of discretion, which an appellate court should not casually interfere unless justified in law. This is a proper case for the Court of Appeal to interfere with the exercise of discretion by the court below (see paras 18 and 33).

(2) The 3863 Consent Order was only for Towry Law to crystallize the fund into cash and to deposit the same in an interest bearing account under the name of Towry Law until further order. There was nothing in the said consent order that could protect the fund to be released to OISB with the respondent currently being the registered majority shareholder. Hence, the learned JC erred in his finding on this issue (see para 22).

(3) On the issue of material non-disclosure of the earlier orders, the paramount consideration was whether the justice of the case required the granting of the interim injunction on the facts presented in an inter parte hearing despite the making of an ex parte order earlier on. There were a host of judicial pronouncements on this point which the learned JC, failed to adequately consider and took quite a narrow and strict interpretation on O 29 r 1(2)(B) of the RHC, whereby failure to comply would leave no option but to set aside the ex parte order and to refuse the interim injunction sought for in the inter parte application (see paras 23, 26).

(4) The learned JC overlooked the point that there remains one major issue between the parties, namely the status of the fund in relation to the estate of Doshi and the shareholding of the respondent in OISB. These are live issues awaiting judicial determination. If these issues had been determined, then there was no explanation given for the respondent not to apply for the striking out of the pending cases. The issue of the appellants not being the directors of OISB or that they were restrained by court orders from interfering in the management of OISB were of not much relevance. The issue of estoppel therefore, had no application (see para 29).

(5) As for the failure to comply with O 3 r 6 ofthe RHC, there was nothing to suggest that the respondent was prejudiced in any way with the application for the ex parte injunction. Hence, there was no basis to fault the appellants on this procedural point (see para 32).

(6) As for the balance of convenience, to allow the release of the fund to OISB at the behest of the respondent would make the pending live issues mere academic when they finally come up for determination. And if those issues are finally determined in favour of the appellants, most likely recourse to recover the fund would be difficult if not absence. Therefore, the balance of convenience obviously tilts in favour of allowing the application for interim relief as prayed for by the appellants (see para 37).

(7) On the issue of adequacy of damages, it was also obvious that once the fund was released to OISB at the request of the respondent, there was nothing to assure that it was recoverable in the event the appellants succeeded in obtaining the prayers sought for in the various actions. Thus, damages would not be adequate in lieu of granting the interim order prayed for (see para 38).

[**Bahasa Malaysia summary**

Kesemua pihak adalah benefisiari kepada harta pusaka si mati Kantilal Prabhulal Doshi ('Doshi') dengan bahagian sama rata. Perayu-perayu pertama dan kedua telah membuat satu permohonan untuk meneruskan perintah permohonan ex parte menyekat responden yang merupakan pengarah urusan dan juga pemegang saham majoriti Overseas Industries Sdn Bhd ('OISB'), di mana dana tersebut diletakkan atas nama akaun Towry Law Asset Management Sdn Bhd ('Towry Law'), daripada berurusan dalam apa cara aset-aset dan dana yang dipegang oleh Towry Law. Di peringkat ex parte, pesuruhjaya kehakiman ('PK') telah membenarkan permohonan perayu untuk menyekat responden dalam tuntutan beliau melepaskan dana tersebut daripada Towry Law. Bagaimanapun, setelah mendengar perkara tersebut secara inter parte, perintah ex parte sebelumnya telah diketepikan dan permohonan untuk injunksi telah ditolak atas alasan-alasan berikut: (i) bahawa telahpun ada Perintah Persetujuan 3863 yang wujud untuk melindungi dana tersebut; (ii) bahawa terdapat ketidakdedahan yang material di peringkat ex parte, justeru itu melanggar A 29 k 1(2)(B) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'); (iii) bahawa terdapat kegagalan di pihak perayu-perayu untuk mematuhi A 3 k 6 KMT sebelum membuat permohonan ex parte tersebut; (iv) bahawa beberapa prosiding mahkamah yang dimulakan oleh perayu-perayu 'smacks of one of the worst cases of abuse of process and thusinterlocutory relief should be refused'; (v) isu estopel sebagai res judicata; (vi)bahawa terdapat perintah mahkamah sebelumnya yang menyekat perayu sebagai pengarah OISB; (vii) bahawa persoalan sama ada terdapat persoalan serius yang perlu dibicarakan tidak penting lagi berdasarkan Perintah Persetujuan 195; (viii) bahawa atas imbangan kesesuaian ia menyebelahi responden memandangkan dana tersebut merupakan aset-aset penting OISB dan ia adalah memudaratkan terhadap operasinya jika ia disekat; dan (ix) bahawa atas ganti rugi mencukupi tiada cabaran berkaitan kemampuan responden untuk menyelesaikan apa-apa tuntutan untuk ganti rugi.

Diputuskan, mengenepikan perintah tersebut dan membenarkan permohonan oleh perayu-perayu:

(1) Keputusan PK yang bijaksana yang enggan memberikan injunksi interlokutori adalah satu penggunaan budi bicara, yang mana mahkamah rayuan tidak sepatutnya dengan senang campur tangan dengan penggunaan budi bicara oleh mahkamah bawahan kecuali dijustifikasikan dari segi undang-undang. Ini adalah kes yang sesuai untuk Mahkamah Rayuan campur tangan dengan penggunaan budi bicara oleh mahkamah bawahan (lihat perenggan-perenggan 18 dan 33).

(2) Perintah Persetujuan 3863 hanya untuk Towry Law membentuk dana dalam bentuk tunai dan untuk mendepositkan yang sama dengan akaun berfaedah atas nama Towry Law sehingga perintah seterusnya. Tiada apa-apa dalam perintah persetujuan yang boleh melindungi danda tersebut daripada dilepaskan kepada OISB dengan responden pada masa tersebut menjadi pemegang saham majoriti berdaftar. Justeru itu, PK telah terkhilaf dalam penemuannya berhubung persoalan ini (lihat perenggan 22).

(3) Berhubung persoalan ketidakdedahan material perintah-perintah sebelumnya, pertimbangan penting adalah sama ada keadilan terhadap kes menghendaki pemberian injunksi interim berdasarkan fakta-fakta yang dikemukakan dalam perbicaraan inter parte meskipun terdapat perintah ex parte yang telah dibuat sebelumnya. Terdapat beberapa pengumuman kehakiman berhubung perkara ini yang mana PK yang bijaksana, telah gagal untuk menimbangkan sewajarnya dan mengambil tafsiran yang sempit dan ketat terhadap A 29 k 1(2)(B) KMT, yang mana kegagalan untuk mematuhinya tidak akan meninggalkan apa-apa pilihan tetapi untuk mengenepikan perintah ex parte tersebut dan menolak injunksi interim yang dipohon dalam permohonan inter parte tersebut (lihat perenggan-perenggan 23, 26).

(4) Pesuruhjaya kehakiman yang bijaksana terlepas perhatian tentang perkara bahawa masih terdapat satu persoalan penting antara pihak-pihak, iaitu kedudukan dana tersebut berkaitan harta pusaka Doshi dan pegangan saham responden dalam OISB. Berikut adalah persoalan yang sedang berjalan dan menunggu penentuan kahakiman. Sekiranya persoalan-persoalan tersebut telah ditentukan, maka tiada penjelasan diberikan kepada responden untuk tidak memohon pembatalan kes-kes yang masih belum selesai. Persoalan perayu-perayu yang bukan merupakan pengarah-pengarah OISB atau bahawa mereka disekat oleh perintah-perintah mahkamah daripada campur tangan dengan pengurusan OISB tidak relevan. Persoalan berkaitan estopel oleh itu, tidak terpakai (lihat perenggan 29).

(5) Berhubung kegaglan untuk mematuhi A 3 k 6 KMT, tiada apa-apa yang mencadangkan bahawa responden telah diprejudiskan dalam apa cara berkaitan permohonan untuk injunksi ex parte tersebut. Justeru itu, tiada apa untuk menyalahkan perayu-perayu berhubung perkara prosedur tersebut (lihat perenggan 32).

(6) Berhubung imbangan kesesuaian, untuk membenarkan pelepasan dana tersebut kepada OISB atas permintaan responden akan menjadikan persoalan-persoalan yang sedang berjalan dan belum selesai tersebut hanya akademik semata-mata setelah ditentukan. Dan jika persoalan-persoalan tersebut telah ditentukan sepenuhnya menyebelahi perayu-perayu, kemungkinan besar sukar untuk mendapat kembali dana tersebut. Oleh itu, imbangan kesesuaian dengan jelas lebih menyebelahi dalam membenarkan permohonan untuk relief interim sebagaimana dipohon oleh perayu-perayu (lihat perenggan 37).

(7) Berhubung ganti rugi yang wajar, adalah jelas bahawa selepas dana tersebut dilepaskan kepada OISB atas permintaan responden tiada apa-apa yang menjanjikan ia dapat dikembalikan sekiranya perayu-perayu berjaya mendapat permohonan-permohonan yang dipohon dalam pelbagai tindakan. Oleh itu, ganti rugi tersebut tidak mencukupi sebagai ganti membenarkan perintah interim yang dipohon (lihat perenggan 38).]

Notes

For cases on balance of convenience, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2483–2486.

Cases referred to

Noor Jahan bte Abdul Wahab v MD Yusoff bin Amanshah & Anor [1994] 1 MLJ 156 (refd)

Perwira Habib Bank Malaysia Bhd v Hong Huat Holdings Sdn Bhd & Ors [1992] 2 MLJ 160 (refd)

Salcon Engineering Sdn Bhd v PRM Energy Systems (M) Sdn Bhd [1993] 3 MLJ 64 (refd)

Legislation referred to

Rules of the High Court 1980 O 3 r 6, O 29 r 1(2)(B)

Appeal from: Originating Summons No 24–985 of 1991 (High Court, Johor Bahru)

M David Moraise (Khabir Dhillon with him) (Zaid Ibrahim & Co) for the appellants.
Steven Thiru (RR Mahendran with him) (RR Mahendran & Co) for the respondent.

Richard Malanjum JCA (delivering judgment of the court):

Introduction

[1] On 11 June 2003, we allowed the appeal by the appellants with costs to be taxed thereby granting them the following orders:

(a) that the order to set aside the ex parte order dated 17 October 2000 pursuant to encl 24 was set aside;

(b) that injunction as prayed for in encl 14 was granted;

(c) that costs to be awarded to the appellants here and in the court below; and

(d) deposit to be refunded to the appellants.

[2] We now state our reasons for coming to such decision.

Background facts

[3] The parties before us are all members of one family. The first appellant is the mother of the second appellant and of the respondent.

[4] The subject of the dispute between the appellants and the respondent revolves around the estate of the late Kantilal Prabhulal Doshi ('Doshi'), who was the husband of the first appellant and the father of the second appellant and the respondent. All the parties are beneficiaries to the estate of Doshi on equal share with the respondent sharing with his wife.

[5] Specifically in relation to the matter before us, it was on the issue of whether the respondent should be restrained from demanding for the release of a sum of money last estimated amounting to US$3m ('the fund') now held in an interest bearing account under the name of Towry Law Asset Management Sdn Bhd ('Towry Law') pursuant to the Consent Order ('the 3863 Consent Order') in relation to Suit No D4–22–3863–1998 ('Suit 3863') filed by the respondent against Towry Law for negligence.

[6] Prior to the death of Doshi the Fund was placed with Towry Law as the Fund Manager under the name of a company, Overseas Industries Sdn Bhd ('OISB').

[7] The majority of the shares in OISB were registered in the name of the respondent. And when Doshi died the respondent commenced a legal action for a declaration that he was the beneficial owner of the majority of the shares in OISB. In turn the first appellant and her younger son, Jogesh who was her co-executors of the estate of Doshi filed an action for a declaration that the shares held by the respondent in OISB were held in trust for the benefit of the estate of Doshi.

[8] The respondent by virtue of his shareholding in OISB also sought by an Originating Summons No 1141 filed in Johor Baru High Court in 1997 ('OS 1141') to have the fund released to him after having taken step to remove the first and second appellants as directors of OISB and replacing them by himself and his wife. That move was opposed by the appellants with application for an injunction being made under OS No 24–985–1991 ('OS 985').

[9] There were also other actions and counter-actions commenced by the parties. And these cases were initially consolidated vide consent order ('the 195 Consent Order') recorded in connection with Johor Bahru High Court Civil Suit No 22–195–1991 ('Suit 195') wherein it was agreed that Suit 195 was to be set down for trial and the decision made thereof would bind the other suits pending between the parties. On 8 May 2002, all the parties agreed to transfer all actions to be heard with OS 1141 in Johor Baru High Court 2. Anyway for this appeal, we are only concerned with the application for an injunction by the appellants for the same purpose of restraining the respondent from having possession of the fund. It was filed when the respondent demanded Towry Law to release the fund to OISB after the first appellant and Jogesh failed before the Court of Appeal in their move to intervene in OS 1141.

The decision of the High Court

[10] At the ex stage, the learned judicial commissioner by an order given on 25 October 2000 allowed the application of the appellants for an ex parte order to restrain the respondent in his demand for the release of the fund from Towry Law.

[11] However upon hearing the matter on inter parte, the earlier ex parte order was set aside and the application for injunction was refused. An application for Erinford order was also denied.

[12] In coming to his decision, the learned judicial commissioner found the following:

(a) that the fund was already protected by the 3868 Consent Order and hence the application for ex parte injunction caused untold embarrassment to the courts that made the earlier orders including the 195 Order;

(b) that there was material non-disclosure on the issue of locus standi on the part of the appellants when applying for the ex parte injunction in view of the restraining order made against the appellants on 14 July 1992 in connection with Suit No 22–169–1991 and hence, they were in breach of O 29 r 1(2)(B) of the Rules of the High Court 1980 ('the RHC') thereby warranting the setting aside of the ex parte order;

(c) that there was a failure on the part of the appellants to comply with O3 r 6 of the RHC before making the ex parte application;

(d) that the several court proceedings instituted by the appellants 'smacks of one of the worst cases of abuse of process and thus interlocutory relief should be refused';

(e) that issue estoppel as res judicata applies in this case;

(f) that there was an earlier court order which debarred the appellants as directors of OISB;

(g) that the issue of whether there was serious question to be tried no longer pertinent in view of the 195 Consent Order;

(h) that on the balance of convenience it was in favour of the respondent since the fund was the core assets of OISB and it would be detrimental to its operation if it was withheld; and

(i) that on the adequacy of damages there was no challenge in respect of the respondent's ability to meet any claim for damages.

Contentions on appeal

[13] Before us, it was submitted that central to the dispute between the parties was the status of the shareholding of the respondent in OISB and unless determined he should not be allowed to have access to the Fund.

[14] It was highlighted that since there was no order made against the respondent personally in his quest to have access to the fund, such situation had caused several applications to be made to counter the steps taken by him for the release of the fund.

[15] As regards the need for the injunctive relief, it was contended that it was due to the lack of probity of the respondent and his attempts to have the fund released which necessitated the ex parte application to be made.

[16] In respect of the conclusions made by the learned judicial commissioner in the court below, the following arguments were submitted:

(i) that the 3863 Consent Order was insufficient to protect the fund from the grasp of the respondent;

(ii) that the issue of material non-disclosure should not be taken to such an extent that the justice of the case at inter parte stage was overlooked;

(iii) that there are serious questions to be tried, in particular on those to be tried under Suit No 195, which involved the status of the first appellant and that of the respondent in OISB;

(iv) that the balance of convenience should be in favour of granting the injunction in view of the lack of probity of the respondent and whether he should be allowed to meddle with the fund when his status in OISB is in issue;

(v) that damages would be inadequate since if the respondent is allowed to have the fund it would never be recovered;

(vi) that the merits of the case should be considered instead of rigid application of the RHC;

(vii) that O 3 r 6 of the RHC 1980 had been complied with and even if not, the respondent suffered no prejudice; and

(viii) that the principle of issue estoppel is not applicable since the 195 Consent Order is only interlocutory in nature.

[17] Learned counsel for the respondent in reply supported the conclusions of the learned judicial commissioner.

Findings

[18] At the outset we would say that the matter before us was an appeal against the decision of the learned judicial commissioner in refusing to grant an interlocutory injunction applied for by the appellants. It was an exercise of discretion which an appellate court should not casually interfere unless justified in law. In *Perwira Habib Bank Malaysia Bhd v Hong Huat Holdings Sdn Bhd & Ors* [1992] 2 MLJ 160, it was reiterated that (per Mohd Azmi SCJ at p 166):

> In our view, irrespective of whether an interim injunction is sought on the basis of statutory provisions or on the inherent jurisdiction of the court to restrain abuse of its process, it must be exercised judicially according to law on established principle of granting injunction as enunciated in American Cyanamid Co v Ethicon Ltd which has been consistently applied by the courts in this country.
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> Although an interlocutory injunction is a discretionary relief vested in the judge of the High Court, and the function of an appellate court is not to exercise an independent discretion on its own, failure to consider statutory provisions and failure to consider balance of convenience entitle this court to rehear the whole application, since … was wrong in law and therefore not an exercise of the judicial discretion.

[19] Hence, in considering this appeal, the first pertinent question to consider should be on the exercise of discretion by the learned judicial commissioner.

[20] We noted that the approach adopted by the learned judicial commissioner was to consider the preliminary issues first before examining whether the established tests necessary in an application for an interim injunction had been satisfied.

[21] Now, based on the findings of the learned judicial commissioner, it is obvious that he was persuaded by the fact that there was already the 3863 Consent Order subsisting that protected the Fund. And since the appellants failed to disclose the said consent order at the ex parte application stage and in view of the provision of O 29 r 1(2)(B) of the RHC which he ruled to be crucial to comply, that added to his reasons for setting aside the ex parte injunction.

[22] We considered the above reasons. With respect, the learned judicial commissioner read too much into the 3863 Consent Order. That order was only for Towry Law to crystallize the fund into cash and to deposit the same in an interest bearing account under the name of Towry Law until further order. There was nothing in the said consent order that could protect the fund to be released to OISB with the respondent currently the registered majority shareholder therein. Hence, we are of the opinion that the learned judicial commissioner erred in his finding on this issue.

[23] Next, on the issue of material non-disclosure of the earlier orders we are inclined to agree with the contention of learned counsel for the appellants that the paramount consideration is whether the justice of the case requires the granting of the interim injunction on the facts presented in an inter parte hearing despite the making of an ex parte order earlier on. Of course, that would entail an examination of the manner in which the non-disclosure was carried out. Indeed, if it amounted to an abuse of process then that would have justified the court in taking the punitive step in not only setting aside the ex parte order but also refusing the subsequent application irrespective of its merits. There are a host of judicial pronouncements on this point. We need only to cite a few.

[24] In the case of *Salcon Engineering Sdn Bhd v PRM Energy Systems (M) Sdn Bhd* [1993] 3 MLJ 64, Anuar J (as he then was) said this at p 66:

> I am more inclined to follow the rationale in the cases of *Bennett v The Excelsior Land, Investment and Building Co Ltd, and Bank* [1893] 14 LR (NSW) (Eq) 179, and *Broadbent & Ors v Marshall & Ors* [1863] 2 VLR 115, in dealing with situations such as the present case, where a limited injunction is granted ex parte until the hearing inter partes. In *Bennett* and *Broadbent*, it was decided that the question of non-disclosure was not relevant at the inter partes hearing where both sides were obviously represented. If there was non-disclosure, this would go towards the award of costs. I would go further and say that material non-disclosure at the ex parte stage might additionally render the plaintiff liable on its undertaking as to damages.
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> This is a more sensible approach since the task of the court at the inter partes hearing is to consider on the basis of all the evidence before it, whether the injunction should be continued or not. I do not agree with the *Bennett* and *Broadbent* approach in so far as serious non-disclosure is concerned. In my judgment, where the non-disclosure is very serious so as to amount to a positive misleading of the court, then it becomes a matter which goes into the balance when considering the probity and bona fides of the applicant. In such circumstances, the court will look at the applicant with a high degree of circumspection.
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> The practicality of the *Bennett* and *Broadbent* approach is that the court will not, at the inter partes hearing, be encumbered with a forensic study on the question

of disclosure. In some cases, such as the present, this is an onerous task involving detailed study of voluminous documents. At the end of this exercise, much time is wasted. I prefer to approach the inter partes hearing on a more pragmatic level by considering the merits of continuing the injunction on the material disclosed by both parties.

[25] In *Noor Jahan bte Abdul Wahab v MD Yusoff bin Amanshah & Anor* [1994] 1 MLJ 156, Edgar Joseph Jr SCJ (sitting as High Court judge) said this at p 167:

> In exercising my discretion under this ground, I have reminded myself of the current approach adopted by the courts. The relevant principles are helpfully summarized for me by Sir Nicolas Browne-Wilkinson VC in *Dormeuil Freres SA & Anor v Nicolian International (Textiles) Ltd* [1988] 3 All ER 197:
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> > 'I will deal first with the application to set aside the ex parte order. It is a basic principle, applicable to all ex parte applications, that a plaintiff seeking ex parte relief must make full disclosure to the court of all facts which are material to the exercise of the court's discretion whether or not to grant the relief. If such disclosure is not made by the plaintiff, the court may discharge the ex parte injunction on that ground alone. But if, in the circumstances existing when the matter comes before the court inter partes, justice requires an order either continuing the ex parte injunction or the grant of a fresh injunction, such an order can be made notwithstanding the earlier failure of the plaintiff to make such disclosure. Moreover, there is authority that, contrary to the law as it was originally laid down, there is no absolute right to have an ex parte order obtained without due disclosure set aside: there is a discretion in the court whether to do so or not.'
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> I accept that facts (i), (ii), (iv) and (v) and to a lesser extent facts (iii) and (vi) were material for the court to know, although they are really facts which constitute part of the first defendant's case. It does not, however, necessarily follow that because the plaintiff had failed to disclose these facts that an order for discharge of the injunction must inevitably follow, for the court would still have to consider whether justice requires the injunction to continue. In considering this part of the case, Ihave asked myself whether the non-disclosure of the facts concerned was so severe that, had there been full disclosure, this court would not have granted the interlocutory injunction (see *Hong Leong Holdings Ltd v Sunbird (Pte) Ltd* [1990] 3 MLJ 65; *Professor Dr A Kahar Bador & Ors v N Krishnan & Ors* [1983] 4 MLJ 407 at p 409).

[26] In the present case, the learned judicial commissioner, with respect, failed to adequately consider the foregoing principle and indeed took quite a narrow and strict interpretation on O 29 r 1(2)(B) of the RHC whereby failure to comply would leave no option but to set aside the ex parte order and to refuse the interim injunction sought for in the inter parte application.

[27] If the learned judicial commissioner had borne in mind that the issue of the shareholding in OISB was still a live issue pending determination, the justice of the case could have been further considered instead of concluding as he did.

[28] It was also the conclusion of the learned judicial commissioner that in view of the restraining orders issued against both the appellants and in particular the court order dated 14 July 1992 wherein it restrained the second

appellant from interfering in the management of OISB the incapacity was self-evident to prevent the appellants from 'the injunctive relief qua directors'. In fact, it was also for this reason, in addition to the ruling by the Court of Appeal not to allow the appellants to intervene in OS 1141 that the learned judicial commissioner found issue estoppel applicable on the facts of this case.

[29] In our opinion, the learned judicial commissioner overlooked the point that there remains one major issue between the parties, namely the status of the fund in relation to the estate of Doshi and the shareholding of the respondent in OISB. These are live issues in the pending suits between the parties. In fact, Suit 195 addresses the shareholding of the respondent while OS 985 concerns the directorship of the respondent in OISB. If these issues had been determined as suggested by learned counsel for the respondent then there was no explanation given for the respondent not to apply for the striking out of the pending cases. Hence, we do not think it is of much relevance the issue of the appellants not being the directors of OISB or that they were restrained by court orders from interfering in the management of OISB. And for the same reason we are of the view that issue estoppel has no application.

[30] One other procedural point raised by the respondent and accepted by the learned judicial commissioner was the failure by the appellants to comply with O 3 r 6 of the RHC.

[31] It was the submission of learned counsel for the appellants that compliance was made. And even if there was none the order did not apply to this case being an urgent application and that there was no prejudice to the respondent in any event.

[32] On this point we are inclined to agree with the learned counsel for the appellants. There was nothing to suggest that the respondent was prejudiced in any way with the application for the ex parte injunction. Indeed as outlined by learned counsel for the appellants notice was given on 29 September 2000 that OS 985 would proceed in relation to the Civil Appeal No J–02–197–1998 and in the intervention order dated 24 May 2000. Accordingly, we find that there is no basis to fault the appellants on this procedural point.

[33] In view of the preliminary reasons for the learned judicial commissioner to set aside the ex parte order and dismissing the inter parte application for injunction and on the basis of the conclusions that we have come, we are of the opinion that this is a proper case for this court, though an appellate court, to interfere with the exercise of discretion by the court below. And we did so accordingly.

[34] When considering the settled principles governing the grant or refusal of an interlocutory injunction, we think the learned judicial commissioner was persuaded by his findings on the issues as discussed above and thus came to the inevitable conclusion that there was no serious question to be tried.

[35] But, with respect, we disagree. As indicated above, there are live issues awaiting judicial determination. Hence, there are serious questions to be tried.

[36] It was the conclusion of the learned judicial commissioner that to allow an interim injunctive relief would deprive OISB of its funds, hence the balance of convenience should tilt against the granting of the interim injunction prayed for.

[37] With respect, we are unable to agree with his conclusion. The fund and the position of the respondent in OISB and his shareholding therein are the very issues that are in controversy. To allow therefore the release of the fund to OISB at the behest of the respondent would make the pending live issues mere academic when they finally come up for determination. And if those issues are finally determined in favour of the appellants, most likely recourse to recover the fund would be difficult if not absence. As such, we are therefore of the view that the balance of convenience obviously tilts in favour of allowing the application for interim relief as prayed for by the appellants.

[38] On the issue of adequacy of damages it is also obvious that once the fund is released to OISB at the request of the respondent there is nothing to assure that it is recoverable in the event the appellants succeed to obtain the prayers sought for in the various actions. Thus, we are of the opinion that damages would not be adequate in lieu of granting the interim order prayed for.

[39] Accordingly, in exercise of our discretion we set aside the order of the court below and allowed the application by the appellants for the orders as prayed for in encl 14 until further order.

[40] The appeal by the appellants is therefore allowed with costs to be taxed and the deposit to be refunded to the appellants.

Order set aside and appellant's application allowed.

Reported by Sally Kee Seok Meng